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At a CIRCUIT COURT of the UNITED STATES, held at the City of New-York, in and for the Southern District of New-York, on the sixteenth day of *December*, in the year of our Lord one thousand eight hundred and nineteen—

BEFORE

The Honourable
BROCKHOLST LIVINGSTON
and
WILLIAM P. VAN NESS, } *Judges.*

G. L. THOMPSON, *Clerk.*

(PIRACY—CONFESSION—FOREIGN COMMISSION.)

THOMAS A. BASS' CASE.

TILLOTSON, *District Attorney for the U. S.* HOFFMAN, BUNNER and STOUGHTON, *Counsel for the Prosecution.*
D. B. OGDEN and J. R. SCOTT, *Counsel for the prisoner.*

On the traverse of an indictment against an American citizen, for piratically seizing and capturing a vessel belonging to a power at peace with the United States, evidence was introduced on behalf of the prosecution, showing that previous to the capture he sailed under a commission, forged on the government of Artegas, and no other evidence as to the capture of the vessel was produced, except that derived from his declaration, that he captured the vessel under a good commission; it was held, that it was incumbent on him to show under what commission he captured such vessel.

To prove a foreign commission, under which one sailed charged with piracy, it is not necessary that the witness should have seen him write, under whose signature and seal the commission purports to have been issued. It is sufficient if the witness saw the commission passing at the office, from whence it issued, as a genuine commission.

A commission, purporting to be that of Artegas, under his seal, issuing from the office of the American consul at Buenos Ayres, as the agent of Artegas, with the name of the vessel, but without either the name of the captain, or the number of guns, being inserted, at the time it was issued, may be afterwards filled up by the person intrusted with such commission: and it will be sufficient to exculpate an American citizen, charged with piracy in capturing a Portuguese vessel.

The prisoner was indicted under the eighth section of the act of congress, passed in 1790, (1 Graydon's Dig. p. 62,) for that he, being a citizen of the United States, to wit, of Richmond, in the state of Virginia, on the 15th day of June, 1818, with force and arms, upon the high seas, to wit, off the Peak of Pico, out of the jurisdiction of any particular state, then being on board a certain schooner or vessel then belonging and appertaining to a certain citizen or citizens of the United States to the jurors unknown, did piratically and feloniously set upon, attack, board, break and enter a certain merchant ship or vessel called the San Joao Baptista, a ship of certain persons to the jurors unknown, and did assault certain mariners, whose names are to the jurors unknown, and did put them in corporal fear and danger of their lives, and the said vessel, her tackle, apparel, and furniture, of the value of $20,000, a quantity of sugar in boxes, of the value of $20,000, and a quantity of coffee in bags, of the value of $1,000, being on board said vessel, the goods and chattels of persons unknown, in the care and possession of said mariners, did piratically and feloniously steal, take and carry away, against the peace, &c. and contrary to the form of the statute.

Tillotson opened the case on behalf of the United States.

Joseph Smith, a witness on behalf of the prosecution, testified, that in the month of April, 1818, he was at the Five Islands in the West-Indies, which islands are dependent on St. Bartholomews.—The witness, in the capacity of a clerk, was on board a vessel called the Republicana, commanded by captain Chase;

and a schooner under American colours, then without a name, commanded by the prisoner, arrived there, and after lying there a few days, the prisoner came in company with captain Mason on board the Republicana, and Mason applied to captain Chase for a copy of the commission of Artegas, under which the Republicana sailed. By the direction of Chase, the witness made a copy of the commission, and signed it with the name of Artegas, but did not affix a seal like that on the original. This copy was delivered by captain Chase to Mason, and an agreement was then made between them, but not in presence of the prisoner, that Mason should allow Chase ten per cent. on all captures which might be made. The witness sailed from the five islands, in the Republicana, to St. Barts; and, in the month of October or November following, saw the prisoner there, who came as a passenger in the American brig Edward from Baltimore.

The witness having heard from captain Chase and captain Clement Catherel, who, on the decease of Chase, took command of the Republicana, that the prisoner had refused to pay the ten per cent. had a conversation with him on the subject, when he did not deny the agreement, but said that captain Mason would not pay the ten per cent., and that it was all privateering. The prisoner admitted to the witness, that he commanded the Constantia, that he had been on a cruise two months, and had, under the commission and colours of Artegas, captured the San Joao Baptista, a Portuguese ship. The witness understood from the crew, that the vessel which came to the Five Islands under American colours was called the Constantia.

John I. Sickels, on being sworn, testified, that at the office of Mr. Stoughton, in which the witness was a clerk, the prisoner, about the time he was arrested and brought before Judge Livingston, admitted to the witness that he, the prisoner, was an American citizen, of Richmond, Virginia; that in June, 1818, he commanded the Constantia, which he purchased as a prize in the West Indies for 600 dollars; and that he captured the Joao Baptista and sent her into St. Barts as a Portuguese vessel, and not as a prize.

The prosecution having rested, the counsel for the prisoner submitted to the court whether the cause ought to go to the jury; inasmuch as the only evidence against the prisoner, relative to his capturing the vessel, was derived from his confession, which taken together amounts to this, that he captured her under a good commission. The confession cannot be separated, but must be taken together.

The counsel for the prosecution contended that the facts in the case, independent of the confession, fully supported the proposition that he captured the vessel under the commission forged by Smith; and that although the rule relative to a confession was that the whole should *be heard*, yet the whole is not to be believed.

The court decided that there was sufficient testimony adduced to warrant the prosecution in resting the case.

The counsel for the prisoner hereupon opened the defence, and produced a commission to the prisoner as a lieutenant in the navy of Artegas, dated 15th November, 1817; and also a commission for his vessel, the Constantia, together with instructions, purporting to have been signed by Artegas, and sealed. These were dated in April, 1818.

Adam Pond, on being sworn as a witness for the prisoner, testified, that he was acquainted with the signature and seal of Artegas, and was fully confident, though he did not see the commissions executed by that chief, that they were of his seal and signature. In the month of January, 1818, the witness was at the office of Mr. Halsey, the American Consul at Buenos Ayres, and saw these commissions, signed and sealed, pass through his hands and his office, as the agent of the government of Artegas. The witness then commanded a Buenos Ayres vessel, and that government was at war with Artegas. In the month of February the witness having received the commissions from Halsey, with the name of the vessel, the Constantia, filled in, and the name of the captain, and number of guns left blank, but with directions from him to fill them as occasion should require, proceeded from Buenos Ayres in a vessel called the Serapo; and arrived at the Five Islands in April; and, on the first or second of May, delivered the commissions to the prisoner,

who agreed to allow the witness twelve and a half per cent. on all captures made by the schooner, which he said he had then lately purchased. Previous to the arrival of the witness, the prisoner had procured a copy of a commission from captain Chase, under which he was about to sail: but the witness having a genuine commission, the prisoner received it; and on his arrival at St. Barts, the witness saw the same commission on board of his vessel.

The counsel for the defendant here rested, and

The counsel for the prosecution submitted to the court whether an American citizen has a right to enter into the service of a foreign power, and make captures, on the high seas, of vessels belonging to another power, at amity with the United States.—And also whether this government of Artegas, a government of but a day, could, consistent with the laws of nations, issue blank commissions under the agency of a consul of the United States at Buenos Ayres.

Judge Livingston, in the decision of the court, said, that he was aware that many abuses have existed and still do exist in relation to captures made of Spanish and Portuguese vessels, by colour of authority emanating from the governments of the independent provinces in South America. With regard to the question, whether an American citizen could enter into foreign service, and make captures of vessels belonging to a power at amity with the United States, it was sufficient to say that this has not been prohibited by any act of Congress. And with regard to the question relative to the sufficiency of blank commissions, it was well known that Mr. Genet, while minister from the French republic to the government of the United States, pursued the same practice, to a considerable extent: Here the principal question is, whether this commission, so put on board this vessel by an agent of the Artegas government, is to be considered a nullity. In the opinion of the court, in a case of life or death, this commission is sufficient to exculpate the prisoner from the charge laid in the indictment.

The jury immediately acquitted the prisoner.

AT a COURT of GENERAL SESSIONS of the Peace, holden in and for the City and County of New-York, at the City-Hall of the said City, on *Monday*, the 6th day of *December*, in the year of our Lord one thousand eight hundred and nineteen—

PRESENT,

The Honourable
CADWALLADER D. COLDEN, *Mayor.*
LEONARD KIP, JOHN P. ANTHONY, } *Aldermen.*
PIERRE C. VAN WYCK, *Dist. Att.*
JOHN W. WYMAN, *Clerk.*

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FORGERY—MISDEMEANOR.

JOHN G. SCHOLTZ, indicted with DANIEL SCOTT.

VAN WYCK, *Counsel for the Prosecution.*
PRICE, and DAVID GRAHAM, *Counsel for the Prisoner.*

A paper, purporting to be a power of attorney, authorizing the receipt of a pension due from the government to a wounded seaman, not under seal, though forged, is not an instrument upon which an indictment for forgery under the statute can be predicated.

An indictment for *feloniously* forging an instrument which is not the subject of a forgery under the statute cannot be sustained at common law.

During the trial, a felony cannot be modified into a misdemeanor.

The prisoner, and Scott, were indicted for forgery.

The indictment contained two counts; the first of which alleged that the prisoner, on the 18th day of May, 1818, with force and arms, at the first ward of the city of New-York, in the county of New-York, *feloniously* did falsely make, forge and counterfeit, and cause and procure to be falsely made, forged and counterfeited, and willingly act and assist in the false making, forging and counterfeiting a certain power of attorney, partly written and partly printed, which said false, forged and counterfeited power of attorney is as follows—that is to say:

Know all men by these presents, that I, James Miller, of the city of New-York, have constituted, made and appointed, and

by these presents do constitute, make and appoint my trusty and beloved friend Daniel L. Scott, my true and lawful attorney, for me and in my name and stead, and to my use to ask, demand, sue for, levy, recover and receive, all sum and sums of money, rents, goods, wares, and other demands whatsoever, which are or shall be due, owing, payable or belonging to me, or detained from me in any manner of ways and means whatsoever by the President of the Branch Bank of the United States, in the city of New-York, on account of my pension, granted to me by the United States, commencing on the eighth day of March, 1815.—Giving and granting unto my said attorney, by these presents, my full and whole power, strength and authority, in and about the premises, to have, use, and take all lawful ways and means in my name for the recovery thereof; and upon the receipt of any such debts, dues, or sums of money as aforesaid, acquittances or other sufficient discharges, for me, and in my name, to make, seal and deliver, and generally all and every other act and acts, thing and things, device and devices, in the law whatsoever needful and necessary to be done in and about the premises, for me, and in my name to do, execute and perform, as largely and amply, to all intents and purposes, as I might or could do if I were personally present, or as the matter required more special authority than is herein given: and attorneys one or more under him, for the purpose aforesaid, to make and constitute and acquire, at pleasure to revoke; ratifying, allowing and holding for firm and effectual, whatever my said attorney shall lawfully do in and about the premises, by virtue hereof.

In witness whereof I have hereunto set my hand and seal, the eighteenth day of May, in the year of our Lord one thousand eight hundred and eighteen.

JAMES MILLER.

Sealed and delivered in the presence of

JNO. G. SCHOLTZ,

With intention to defraud one James Miller, against the form of the statute in such case made and provided, and against the peace of the people of the state of New-York, and their dignity.

The other count was for feloniously and falsely uttering and publishing as true the same instrument, with an intention to defraud Miller; and concluded in the same manner as the first count.

James Miller, on being called as a witness on behalf of the prosecution, was objected to as a witness by the counsel for the prisoner, on the ground that he, Miller, had been convicted of larceny in the state of Massachusetts. To prove this, the counsel offered in evidence, a copy of the indictment, accompanied with certified minutes by the clerk of the court in Boston, where Miller was tried; also accompanied by a certificate of the judge who presided at the trial. These documents were accompanied by a certificate from the governor of Massachusetts, stating that the said judge was the presiding judge in that court.

This evidence was objected to by Van Wyck, on the ground that these documents were not a certified copy of the record. The court so decided.

The witness, on being sworn, stated, that during the last war he was wounded on board the Avon, and thereby became entitled to a pension. In February or March, 1818, he went, with one John Morris, to the office of Scholtz, in Chatham-street, who undertook to procure the pension.

The power set forth in the indictment, shown to the witness, is not subscribed with his signature, but appears to be in Scott's handwriting; and the name of Scholtz subscribed as a witness to the same instrument, is his.

Hereupon, Van Wyck read to the jury,

1. The power of attorney.

2. The notarial certificate of Scholtz, with his seal of office attached, stating that on the 18th of May, 1818, Miller acknowledged the power.

3. A paper, purporting to be an affidavit of James Miller, stating that he is the same person mentioned in the certificate, of which the within is a true copy, and that his disability still continues. This paper purported to have been sworn to on the same 18th of May. The certificate, on the back of which the affidavit was drawn, was subscribed by B. W. Crowningshield, secretary of the navy, dated the 10th of May, 1818, stating, that in consequence of a wound received on

board a private armed vessel during the war, Miller was entitled to receive at the office of discount and deposit of the United States in New-York, six dollars a month, payable half yearly, on the first of July and January in every year, during life, to commence on the eighth of March, 1815.

The certificate was regularly registered; and to the papers aforesaid was attached a receipt of $202 60, from Daniel L. Scott to Isaac Lawrence, president of the Branch Bank, being for thirty-three months and twenty-three days pension of Miller.

The witness proceeded to state, that he never made the affidavit on the back of the certificate. He saw the prisoner frequently at his office, always went there with Morris; and the prisoner often showed the leg of the witness, which suffered amputation, to persons in the office, and said, "Here is the poor fellow for whom we are getting a pension."

His cross-examination was conducted by Price; but for the purpose of understanding the decision of the court, which is the most important part of the case, a minute detail of facts is unnecessary.

It further appeared in substance, from all the testimony taken in connexion, that Miller, in company with his friend John Morris, went to the office of Scholtz and Scott for the purpose of getting the pension due to Miller. Scholtz undertook. Miller and Morris afterwards went several times to the office to inquire whether the certificate had arrived, and were informed that the testimony was not sufficient: Morris wrote to the prize master Gibbs, at Baltimore, and procured the necessary evidence, and delivered it to Scholtz and Scott. The power in question was then forged by Scott, and witnessed by Scholtz, and by virtue of the documents Scott went to the Branch Bank, and received $202 50, on the 18th of May, 1818. It was not until July or August following, Miller found that he had been defrauded; and in January following, sent to Washington for another certificate, on which to ground a prosecution for forgery. This arrived, and with the documents from the Branch Bank attached, were lodged in the police office.

The prisoners and their friends applied to Miller to settle the affair, and offered him the note of West, payable to one Tyatt, and endorsed by him, and also a patent of land. Miller agreed to accept this offer; but afterwards became dissatisfied, on finding the note was not good; he however agreed to accept $100 in cash, and not complain to the grand jury. This sum was paid him by Mrs. Scholtz. Before this arrangement Scholtz admitted that the power was forged, alleged that it was in vain for him to deny it, and that the only thing which would save him, would be for his friends to raise the money and prevent the thing from going before the grand jury.

After the testimony had closed, the counsel for the prisoner contended to the court, that the instrument upon which the indictment was founded was not a power. It was incomplete and not adapted to perpetrate a fraud. The indictment sets forth the instrument as if it was under seal; but none is affixed; and, in its wording, this instrument is not within either of the statutes relating to forgery. The counsel referred to and read the statutes, (1 vol. R. L. p. 405, sec. 1st, and ib. p. 408, sec. 4th,) and, for the purpose of supporting the position, that "indictments grounded on penal statutes, especially the most penal, must pursue the statute so as to bring the party within it," the counsel cited Foster's Crown Law, p. 423, and 3d vol. Chitty's Crim. Law, p. 1041.

Van Wyck, contra.

The mayor pronounced the decision of the court, that this indictment could not be sustained under the statute; but left it for the consideration of the counsel, whether the indictment still, for the purposes of this prosecution, was not good at common law.

The counsel for the prisoner contended, that although the public prosecutor, in certain cases, was permitted to reject the words *contra formam statuti* in an indictment, yet he could not alter the description of the offence, as found by the grand jury. This indictment charges the defendants with having *feloniously* forged a power of attorney; and this description gives a quality to the act, and described an offence unknown to the com-

mon law. The issue for the jury to try must admit a general verdict. Could the jury in this case, at common law, pronounce that the defendants *feloniously* forged this instrument? It is admitted that they could not. Can they then modify the description of the offence charged, and, by a special verdict, find the defendants guilty of that for which they have never been presented by a grand jury?

The counsel in support of their argument, read the following passage from the 1st vol. of Chitty's Crim. Law, p. 251. "The rule, however, as to finding an inferior degree of guilt, must be understood with some limitation: for a felony cannot, upon the trial, be modified into a misdemeanor; since the defendant would thereby lose the benefit of making his full defence by counsel, a copy of the indictment, and a special jury."

Van Wyck, contra.

The mayor pronounced the final decision of the court, that this indictment could not be sustained at common law, and so charged the jury, who immediately acquitted the prisoner.

An indictment for a conspiracy, in the same transaction, was found during the term against Scholtz and Scott.

(FORGERY—SCIENTER.)

LEWIS SMITH and DENNIS DOUGHERTY'S CASES.

VAN WYCK, *Counsel for the two prosecutions.*

Dr. GRAHAM, *Counsel for the prisoners.*

Neither the clemency of the executive, nor an acquittal under the most suspicious circumstances, can restrain the abandoned from the commission of crime.

Evidence that the prisoner passed other counterfeit bills, not laid in the indictment, for the purpose of establishing the *scienter*, is inadmissible, unless such bills are produced.

D. in the month of July, 1818, was tried on an indictment for passing two counterfeit bills on the Mechanics' Bank, and on the trial, for the purpose of establishing the *scienter*. the District Attorney introduced testimony, that a year previous to that trial, he passed other counterfeit bills, and strong circumstances were adduced to show that the prisoner knew the last-mentioned bills were counterfeit. He was, however, acquitted. On the traverse of an indictment against him, in the month of December, 1819, for passing other counterfeit bills, it was held, that the District Attorney might introduce testimony that the prisoner passed not only the bills for the passing of which he had formerly been tried and acquitted, but also those passed previously.

Lewis Smith, during the term of August, 1816, was indicted, tried, convicted and sentenced to the state prison seven years, for passing counterfeit money; (see 1 vol. City-Hall Recorder, p. 133;) and on Wednesday, the 10th of November last, he was brought to trial on an indictment for forging and passing, knowing it to be counterfeit, a $5 bill on the Union Bank, on the 17th of October last.

Evidence: About a week previous to the day laid in the indictment, Gershom G. Griffiths was at the market, held during the prevalence of the yellow fever in Chatham-square, and saw the prisoner passing a $5 counterfeit bill on the Newburgh Bank, for some small article, to a person unacquainted with money; and, knowing the bill to be bad, Griffiths prevented the prisoner from perpetrating the contemplated fraud. This bill, however, was not produced on the trial. On the day laid in the indictment, the prisoner was at the same place, and passed the bill laid in the indictment, to Daniel Wischart, an ignorant German market man, for a peck of potatoes. The prisoner said he had no other money; and Wischart gave him the change. Griffiths stood by, and recollecting the conduct of the prisoner on the former occasion, found the bill was counterfeit, and in his presence informed Wischart, who applied to the prisoner, and he then returned the change and received the bill. Perceiving that there was to be an examination of the bill, he dropped it at his feet. On being searched, there was found on him a good $1 bill, and some change.

The mayor, in his charge to the jury, instructed them to lay entirely out of view, the circumstance of passing the bill on the Newburgh Bank; for that bill had not been produced. He recapitulated the prominent facts in the case, and left the important question, whether the prisoner passed the bill laid in the indictment, *knowing it to be counterfeit*, for the determination of the jury.

They convicted the prisoner, who cried like a child, on being sentenced seven years to the state prison. Twenty years ago, he had been a deputy under sheriff Lansing.

Dennis Dougherty, during the term of July, 1818, (see 3d vol. City-Hall Recorder, p. 148,) was indicted and tried for passing two $5 bills on the Mechanics' Bank. On that trial, the evidence to establish the *scienter* was but slight; but the district attorney introduced testimony, showing, that about a year previous to the time laid in that indictment the prisoner and another passed counterfeit bills at a horse race in Harlæm-lane; and when detected, the prisoner chewed one of the bills. Other strong circumstances, calculated to evince that the prisoner knew these bills to be counterfeit, were introduced; but he was acquitted.

On Saturday, the 11th of December instant, he was brought to trial, on an indictment against him and Patrick Rourke, for forging and uttering, knowing it to be forged, a counterfeit bill of $5 on the Union Bank.

It appeared in evidence, that on the day laid in the indictment, the prisoner and Patrick Rourke came together to the tin shop of John Duffie, (306 Bowery,) and inquired for tin ware. The prisoner said, that he had recommended Rourke, who was about going to sea, to that store. After examining the wares, they selected an article, the price of which was four shillings, and Rourke took from his pocket a paper box, into which the prisoner put his hand, and took out the bill laid in the indictment, saying to Rourke, "That is the proper bill to give." The prisoner thereupon handed this bill to the boy behind the counter, who carried it, to get it changed, to John Farrington. He had been imposed on, a short time before, by counterfeit bills of the same impression; and, for the purpose of ascertaining from what quarter they came, went over with the boy, and found Rourke and the prisoner there. Rourke said he got the bill of a cartman, but could not tell his name. Farrington requested Rourke to tell where he lived, who at first refused to tell, but afterwards said that he lived in Duane-street, near Dooly's.—On their way thither, the prisoner and Rourke objected to going there. They met a watchman, whom Farrington desired to take them to the watch-house; and, while on the way, near Pump-street, Dougherty jogged Rourke, who pulled off his hat, and at that instant Farrington heard something rattle, and found, by seizing the hand of Rourke, that he had crushed the box, and, in the scuffle, cast it away in the street. Some money was found in the street, and some in the box; and among the money there was found five other counterfeit bills on the Union Bank, one of which was a $5 bill, and the others $3 bills. The one laid in the indictment had been retained by Farrington.

Rourke was introduced as an approver, but, by reason of his inconsistent and contradictory statements, no reliance could be placed on his testimony.

Van Wyck, for the purpose of establishing the *scienter*, offered evidence which had been introduced on the former trial, wherein the prisoner had been acquitted.

The opposite counsel contended to the court, that such evidence ought not to be admitted, because the prisoner had been acquitted of that charge. They also urged, that the time in which the former offences were committed, if at all, was too remote; and no connexion existed between them and the one charged in this indictment. The counsel referred to the principle upon which the jury was charged in the former case, as reported; and contended, that the same principle should govern in this.

The mayor pronounced the decision of the court, that the evidence offered was admissible. He considered it immaterial, whether the prisoner had been acquitted on the former trial or not; for the evidence now offered, is not for the purpose of convicting him for that offence, but to show, that when he passed the bill laid in this indictment *he knew it to be counterfeit.* It is true, that when a man merely passes a counterfeit bill, and no circumstances, connected with that transaction, can be produced to show that he knew it to be counterfeit, or if the circumstances produced are but slight,

the inference against him, that he knew the bill laid in the indictment to be counterfeit, would seem to be harshly drawn from evidence, that at a remote time, and on a distinct and independent transaction, he passed other counterfeit bills; however strong may be the circumstances to establish the inference that he knew such bills to be counterfeit. Such evidence is merely accumulative; and, separately considered, can never produce a conviction. Still, it is proper for the consideration of a jury: and if, in the case before them, they find circumstances from which an inference may be drawn that the prisoner knew the bill laid in the indictment to be counterfeit, then, for the purpose of strengthening that inference, they may resort to extrinsic circumstances, and conjoin them with those connected with the principal offence. Such was the principle upon which the jury was charged in the former case.

The mayor, in the decision, also referred to the case of Bartow, (3d vol. City-Hall Recorder, p. 143.) In that case the prisoner was acquitted on a trial for passing a forged check, and was soon after tried on another charge for forging and passing another check, when evidence was admitted that he passed the check laid in the indictment, upon which he had formerly been acquitted.

Jacob Hays testified, that on the 18th of June, 1818, he arrested a man in this city, who had in his possession $85,000 in counterfeit bills, a part of which were fives on the Mechanics' Bank. Understanding that the prisoner had $300, in counterfeit bills on the same bank, the witness caused him to be watched by Dusenberry, another officer, who, the same day, arrested him in Broadway, when there were found in his possession, three counterfeit bills of the same plate from which a part of the $85,000 was struck.

John M. Lester and Stephen Baxter were severally sworn as witnesses on behalf of the prosecution, and testified as to the passing of two counterfeit bills by the prisoner, at a horse race in Harlæm-lane, detailed in the report of the former trial.

It appeared, that on two of the bills found by Dusenberry in the possession of the prisoner, the former indictment, on which he had been acquitted, was founded.

After the arguments of the respective counsel, the mayor, in his charge to the jury, adverted to the principal facts in the case, evincive of a co-operation between Rourke and the prisoner, in passing the bill laid in the indictment. The principal question was, *whether they knew it to be counterfeit?* and on this branch of the subject, it was necessary to resort to circumstances. Should the jury find circumstances in the case from which an inference could be drawn, that the prisoner knew the bill laid in the indictment to be bad, it would be competent for the jury to resort to circumstances derived from the conduct of the prisoner on former occasions.

The prisoner was convicted; and, on the last day of the term, sentenced to the state prison seven years. He had formerly, for a number of years, been a constable in this city.

(PRACTICE PREPARATORY TO AN ATTACHMENT—PROFESSIONAL CONFIDENCE—PERJURY.)

JOHN NEAFIE'S CASE.

VAN WYCK and WILSON, *Counsel for the prosecution.*

R. RIKER, DR. GRAHAM and MORRELL, *Counsel for the defendant.*

A copy of the affidavit upon which a motion for a rule to show cause is founded, together with a certified copy of such rule, should be served on the party required to show cause in a proceeding for an attachment.

Where a note, which had been protested at the bank, originally came into the hands of M., an attorney, from his client D., one of the endorsers, and N., another of the endorsers, against whom a suit is commenced and a judgment by confession entered, satisfies the judgment, and then requests M. to collect the money due on the note of the maker, and is afterwards indicted for perjury, on the trial of which it is necessary to produce the note; it was held that M. could not withhold it on the ground of professional confidence.

The defendant was indicted for wilful and corrupt perjury, in swearing to an affidavit in the police office, on the 26th

of December, 1818, before Charles Christian, Esquire. This affidavit was that on which the indictment for forgery against Gilbert B. Hutchins (ante, p 119.) was founded.

The amount of the affidavit set forth in the indictment was, that on the 12th of October, 1818, Gilbert B. Hutchins called the deponent into the store, and asked him to endorse the note for his accommodation. The deponent consented; and G. B. Hutchins drew the note and signed it. The deponent being in haste did not examine it, except to see it was drawn in his favour, and immediately endorsed it and went off. Hutchins passed it to Peter De Baun, and it was protested the 14th of December, 1818. The deponent has discovered that G. B. Hutchins did not affix his own name, but that of Israel B. Hutchins, his brother, and signed his own name, as endorser, under that of the deponent, for the purpose of defrauding him and others out of 800 dollars.

The note referred to in the affidavit was in these words and figures:

"$800

"Sixty days after date I promise to pay John Neafie, or order, eight hundred dollars, for value received. New-York, Oct. 12th, 1818.

ISRAEL B. HUTCHINS."

Endorsed

JOHN NEAFIE,

G. B. HUTCHINS,

PETER DE BAUN.

The last name endorsed was erased.

The facts in this case were complicated: above thirty witnesses were examined, and the trial occupied nearly three days. The prominent facts only will be presented.

On the 9th of December instant, Van Wyck suggested to the court that, after the trial of Gilbert B. Hutchins for forgery, Peter De Baun applied to him for the note above set forth, to be used on a trial in the mayor's court, and promised to return the same. That thereupon Van Wyck delivered him the note, and since the indictment in this case had been found, had called on him for the same, and requested him to deliver it; but he said it was not in his possession.

De Baun, being present when this suggestion was made, did not deny the above statement, but alleged that he had not the note.

The court, on the motion of the district attorney, laid De Baun under a recognisance of 500 dollars to appear as a witness in this cause, and suggested that a *subpœna duces tecum* to produce the note should be served on him. This was done; and, on an affidavit of the district attorney, containing the above facts in relation to the possession of the note by De Baun, the court granted an order that he produce that note on the opening of the court on the 10th instant, or show cause why an attachment should not issue against him.

A copy of this order, without showing the original, or serving a copy of the affidavit, was served on De Baun, who was present in court when the affidavit was read and the motion made.

Riker, on the 10th, appeared to show cause. He contended that the proceeding was irregular. A certified copy of the order, and the affidavit on which the order was granted, ought to have been served. He cited 3 Term Rep. 351. and 1 Bac. Ab. tit. Attachment.

Van Wyck, contra.

The court decided that the course pointed out by the counsel for De Baun was correct, as preparatory to an attachment.

The rule was discharged and one granted for the production of the note on the 12th instant.

On that day Riker appeared to show cause, and having read two affidavits showing that the note was not in possession of De Baun, the rule against him was discharged.

A *subpœna duces tecum* to produce the same note had been served on Elisha Morrell, Esquire, one of the counsel for Neafie.

On being sworn as a witness for the prosecution, Morrell stated that De Baun, in the first instance, as the client of the witness, brought him the note, and engaged him to commence suits against Neafie and Gilbert B. Hutchins, as endorsers, to recover the money. Two judgments were obtained; one by confession against Neafie, and the other against G. B. Hutchins. Neafie paid on the judgment against him 200 dollars to

the witness. After the trial of G. B. Hutchins, for forgery, De Baun took the note from Van Wyck and brought it to the witness. Neafie then called on the witness, and requested him to collect the money from Israel B. Hutchins, as the maker of the note, as G. B. Hutchins was acquitted on the charge of forgery.

When the witness first received the note he would have delivered it to either Neafie or De Baun, but now would not deliver it to either. The witness therefore declined producing the note, except under the direction of the court.

Riker contended that, on the ground of professional confidence, Morrell ought not to be compelled to produce the note, because it was in his hands as attorney for the defendant, who was not bound to produce testimony against himself. The counsel cited the case of Butler vs. Hammer, (13 Johns. Rep.)

Van Wyck, contra.

The mayor delivered the opinion of the court, that the production of the note could not be withheld by Morrell on the ground of professional confidence. If during the progress of a prosecution any disclosure is made to counsel, or any paper delivered to him by his client, the counsel cannot reveal or give evidence of such disclosure, or deliver such paper. But, in this case, the counsel did not receive this note as the attorney of Neafie. It was delivered by De Baun; and it was not until after this accusation of Neafie that he paid the sum of 200 dollars.

The note was produced, when Charles Christian testified that the affidavit on which the indictment was founded was made before him in the police office by the defendant.

Israel B. Hutchins and Gilbert B. Hutchins being examined separately, and not in presence of each other, concurred in stating that the note was written and executed by Israel B. Hutchins, on Saturday evening, the 10th of October, 1818, between candle light and twelve o'clock at night, at the store of Israel B. Hutchins, at the corner of Hudson and Vandamme streets, in their presence and that of John Neafie; and that at his express request the date of the note was on the 12th instead of the 10th of October, that the time of payment at the bank might be prolonged. The note was given as the balance on a note of 1,460 dollars, payable in instalments, dated the 30th of December, 1817, due by Israel B. Hutchins to Neafie, and signed by Gilbert B. Hutchins as security. On a settlement made a short time before the note of 800 dollars was given, 870 dollars were found due to Neafie, who agreed to receive a note of 800 dollars, to be discounted at the bank, and to take the 70 dollars out of the store.

The note was drawn, and the next morning Israel B. Hutchins sailed for the Mobile. The note was discounted at Jacob Barker's bank, and Neafie received the money.

On behalf of the defendant it appeared, by the testimony of a number of witnesses, members of his own family and others, some of whom were at the store from an early hour until after twelve o'clock, that on Saturday evening, the 10th of October, 1818, he was not in the store of Hutchins; but had returned from a town in New-Jersey late in the afternoon of that day, and retired to rest at an early hour, by reason of indisposition.

It also appeared, by the testimony of John W. Kairn, that after the prosecution for forgery had been commenced against Gilbert B. Hutchins, and before his departure for the Mobile for his brother, there was an unsettled account between the witness and Gilbert B. Hutchins, on the settlement of which it was known by both that the witness would owe Hutchins about 20 dollars. He was very solicitous for the friendship of the witness in court, for which he offered the witness this balance of 20 dollars, and more if that was not sufficient. The witness inquired of Hutchins what he meant by this *friendship in court*, and he replied that he wanted him to swear that he saw Israel B. Hutchins execute the note of 800 dollars, saying that it could not be possible but that the witness knew that fact. Gilbert B. Hutchins was at the house of the witness frequently; and at length he ascertained, and now believes, that the object was to induce him to swear false.

After the arguments of the respective counsel, and the charge of the court, the jury acquitted the defendant.

(SETTLEMENT OF A PAUPER.)

In the Matter of Appeal of the Overseers of the Poor of the town of Hempstead, against the Order of the Commissioners of the Alms-House in New-York, for the removal of Ann Kelly, a Pauper, and her three Children.

S. JONES, *Counsel for the Appellants.*
OGDEN EDWARDS, *Counsel for the Respondents.*

To acquire a settlement in this state, under the second section of the act "for the relief and settlement of the poor," in relation to foreigners, it is necessary that the mariner or other healthy able bodied person, claiming such settlement, should have come directly from some foreign port or place into this state; and on an appeal from an order of the Commissioners of the Alms-House for the removal of a pauper whose settlement, as alleged by the Appellants, followed that of such foreigner, it is incumbent on them to show affirmatively that he did so come directly from some foreign port or place into this state.

Ann Kelly, a pauper, in the month of September, 1816, was the wife of John Morris, by whom she had three children. They then resided in this city, where they had acquired a settlement. In that month they removed to Hempstead, in Queen's county, where Morris purchased a farm, acquired a settlement, and remained eleven months, when he died, and the farm was sold for the payment of his debts. In the month of October, 1817, the pauper married James Kelly, an Irishman, who, for sixteen months immediately prior to his marriage, lived with a Mr. Delacroix in this city, as a common labourer. After the marriage, Kelly, his wife, and the three children removed to this city; and on or about the 25th of December, 1818, Kelly left the city, and has not since been heard of: the pauper and her three children remained in this city from the time of their removal from Hempstead until the month of October last; but no new settlement was acquired during this time by the hiring of a tenement. Before the marriage of Kelly, he stated to Delacroix that he, Kelly, came from Canada to this city, and was a British pensioner, having been wounded in the battle of New-Orleans, and being then a British mariner. He also stated to Thomas Devereaux that he came from Dublin, and was a mariner.

Under such circumstances the Commissioners of the Alms-House made an order for the removal of Ann Kelly, the pauper, and her three children, from this city to Hempstead, from whence they last came.

The preceding facts were admitted on both sides, and appeared in testimony.

Jones contended, that although the pauper and her three children had gained a settlement in Hempstead, yet, that she had lost it by her marrying James Kelly, and removing to this city, where he had acquired a settlement by virtue of the second section of the "Act for the relief and settlement of the poor." (1 vol. R. L. p. 279.) "And that all mariners, coming into this state and having no settlement in this state, or in any other of the United States of America, and every other healthy able-bodied person, coming directly from some foreign port or place into this state, shall be deemed and adjudged to be legally settled in the city or town in which he or she shall have first resided for the space of one year."

The counsel argued that the first branch of this statute in relation to *mariners*, does not require that they should have come "directly from some foreign port or place into this state." And this qualification in the act was applicable only to *other healthy able-bodied persons* mentioned in a subsequent part of the statute. If, on the part of the appellants, it be shown affirmatively that James Kelly, when he first came to this city, was a foreigner, it will rest with the respondents to show that he came from another state and did not come directly from a foreign port or place into this state. That he was a foreigner, had been shown by such testimony as the nature of the case would admit; and the counsel contended that it was sufficient.

Edwards insisted that the facts before the court were insufficient to show that Kelly acquired a settlement in this city by virtue of the section of the statute relied on by the opposite counsel. To bring the case within the act it was incumbent on him to show, not only that

Kelly was a foreigner, but that he came "directly from some foreign port or place into this state." This does not appear; but, on the contrary, the plain inference to be derived from all the facts, taken in connexion, is, that he came directly from Canada into this state. If so, he does not come within the description of persons contemplated by the section of the act relied on by the Appellants. For it does not follow that because he was a mariner when he was at the battle of New-Orleans, that he was such when came to this city. The evidence is, that while here with Mr. Delacroix he was a common labourer, and there is no evidence before the court from which it can be rationally inferred that he was a mariner, and came directly from some foreign port or place into this state.

If there is any question in the case it arises on the second branch of the statute relative to "able-bodied men." And if there was no other port in the United States, except that of New-York, into which a foreigner might come, from the facts in this case, a slight presumption might arise that Kelly came directly into the port of New-York from some foreign port or place. But, from Maine to Georgia, there is a number of ports into which he might have come; and it lies on the part of the appellants to show, affirmatively, that he came directly from some foreign port or place into this state. That he did not so come into this state, it would be impossible for the respondents to establish.

The counsel further contended, from the facts before the court, that Kelly came directly to this city from Canada, and, therefore, according to a recent act of the legislature, did not acquire a settlement.

The counsel, in support of his argument, read from "An act to amend the act for the relief and settlement of the poor," passed April 5th, 1817. 4 vol. L. N. Y. fortieth session, p. 176, sec. 2. "That from and after the passing of this act, no person removing out of any other state, or from Upper or Lower Canada, to reside or inhabit in any city or town within this state, shall be deemed or adjudged to have gained a settlement in such city or town, unless such person shall have purchased a real estate in such city or town, of the value of two hundred and fifty dollars, and actually shall have paid for the same, or shall actually and bona fide have rented or occupied a tenement, of the yearly value of one hundred dollars or upwards, for four years, and actually have paid such rent," &c.

After the reply of Jones, the recorder delivered the opinion of the court, that there was not sufficient evidence that James Kelly, when he came into this city, came directly from some foreign port or place: that all the evidence on the subject was derived from his declarations, and these were contradictory; and that as the pauper had acquired a settlement in the town of Hempstead, her last place of residence previous to her removal to this city, the order of the Commissioners of the Alms-House for her removal to Hempstead was correct, and ought to be confirmed.

Order confirmed.

(KIDNAPPING—INVEIGLING.*)

JOSEPH PULFORD'S CASE.

VAN WYCK, *Counsel for the prosecution.*
Dr. GRAHAM and SCOTT, *Counsel for the prisoner.*

On the traverse of an indictment under the act for kidnapping or inveigling a negro, with intent to send him out of the state, it is not necessary to show either that force was employed by the defendant, or that it was against the will of such negro.

The prisoner was indicted under the statute of the 42d session of the legislature of this state, (L. N. Y. p. 173, sec. 2d,) for inveigling and kidnapping Mary Underhill, with intent to send her out of the state of New-York to the Havanna, in the island of Cuba, on the 28th day of November last.

The section of the statute, upon which the indictment was founded, is in these

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* For cases of kidnapping, inveigling, and exportation of black people, and for the subject of slavery, see 2d vol. of the City-Hall Recorder, from p. 120 to 130, 3d vol. ib. 139, 4th vol. ib. 47.

words: "That if any person shall, without due process of law, seize and forcibly confine, or inveigle, or kidnap any negro, mulatto, mustee, or other person of colour, with intent to send or carry him out of this state; or shall conspire with any person or persons, or aid, abet, assist, hire, command or procure any other person to commit the said offence, or any captain of a vessel, or other person, shall sell or dispose of, in any foreign port or place, any negro, mulatto, mustee, or other person of colour, and shall be duly convicted of any of the said offences, before any court of oyer and terminer or general sessions of the peace, of any county in this state, shall be fined or imprisoned, or both, in the discretion of the court before which such conviction shall be had; such fine to be not less than one thousand dollars, nor more than two thousand dollars; such imprisonment to be in the state prison, at hard labour, for any term not exceeding fourteen years."

It appeared in evidence, that previous to the day laid in the indictment, the prisoner had been making overtures for the sale of a woman of colour to the captain of a vessel, lying at the foot of Rector-street, about to sail for the Havanna. Mary Underhill, named in the indictment, was a free black woman, at service in a house in Franklin-street. The prisoner had an interview with her, and offered to get her a place worth 100 dollars a year; and at the same time told her "To keep dark and say nothing." He requested her to get ready on the following Sunday evening, when he would call and go with her to the place. Accordingly she prepared at the time appointed, and the prisoner came. He conducted her near the place where the vessel lay, and left her for the purpose, as he said, of going to see the captain; telling her, that if any one asked her what she was waiting for, to say that she was waiting for her husband. She staid there a considerable time, when he returned and told her that the captain had not come, and then conducted her into an alley, where he told her to call him master, in presence of the persons she might see, and that he was going to take her on board of the vessel, and pretend to sell her to the captain, and would give her one half of the money. He further instructed her to go into the cabin, and come out again on deck, and while the captain should go into the cabin, she should jump off of the vessel and run away. After giving her these instructions he left her, and went to see the captain.

Previous to this time, the captain had represented the affair to Henry I. Hassey, who procured John C. Gillen, a constable of the second ward, and with him concerted measures for the complete detection of the prisoner. When he came, the captain, in pursuance of a preconcert, introduced to the prisoner Gillen, as a merchant from the Havanna, by the name of Johnson, in want of negroes. Gillen, under the fictitious character he had assumed, represented that he had forty negroes on board, and wanted two more to complete his complement. The prisoner said, that the one he had brought down that evening made thirty which he had taken. He said she was a good one, and weighed one hundred and fifty weight. His price was 50 dollars; and when inquired of where she was, he said she was close by. The pretended purchaser wished him to bring her down; but this he was unwilling to do, until the money was paid, asserting, that *he had been taken in too often in that way.* The parties disputed and cavilled much; merchant Johnson affirmed, that he would not "buy a pig in the poke," and solicited the prisoner to bring her down, and cautioned him against speaking so loud, as it was dangerous business. The prisoner said, that he could get two more before ten o'clock at night; that he generally procured them in Bancker-street, but that this one was from Kingston, in the country.

At length the prisoner took merchant Johnson into the alley, and showed him the black woman, whom he examined, and judged she was of the weight represented. He took out his pocket book, and was about paying the 50 dollars, which the prisoner expected, and was anxious to receive; but when a receipt was required, a fresh difficulty arose, and suddenly merchant Johnson was metamorphosed into John C. Gillen, *a constable.* He said, "You must go along with me!" This made the prisoner look

foolish, and say "Oh! you're a joking." Both the prisoner and Mary Underhill were taken to the police. In giving her testimony on the trial, she appeared to be extremely simple and ignorant.

The counsel for the prisoner contended to the court and jury, that he ought not to be convicted, because no force was employed in kidnapping the woman, nor was she taken against her will.

Van Wyck, contra.

The mayor, in his charge to the jury said, that such an atrocious transaction, as was disclosed by the testimony in this case, was calculated to rouse the most indignant feelings towards the perpetrator; but it was their duty to suppress those feelings, and preserve the utmost calmness in their deliberations.

The prisoner was indicted under a statute of our state, recently passed, for the protection of that race of people, who, by the injustice of our ancestors, had originally been brought to our shores. For among the humane and enlightened part of mankind, it was now considered that the introduction of these people of colour, as slaves, was founded in cruelty and injustice.

It is contended in this case, on behalf of the prisoner, that under this act it is necessary to show that the person alleged to have been kidnapped was, "without due process of law, seized and forcibly confined." But this, in the opinion of the court, is not necessary; it is sufficient if such person was inveigled or kidnapped with an intent to send or carry him or her out of this state. To constitute kidnapping or inveigling, no force is necessary; for, no doubt, these terms import any inducement, by fraud or covin, calculated to accomplish the object against which the statute was passed to prevent.

The mayor here went into an examination of the testimony of Mary Underhill. Her testimony, he said, was unimpeached, except, perhaps, by her extreme simplicity and ignorance; and, no doubt, for that reason, the prisoner selected her as a fit object by which he might accomplish his nefarious design. Should the jury believe her story, corroborated as it is by the testimony of Hassey and Gillen, the mayor did not hesitate to instruct the jury, that this was as clear a case of kidnapping and inveigling under the act as could be conceived. With regard to the law, there could be no question.

The jury immediately convicted the prisoner, and he was immediately sentenced.

The mayor, in the conclusion of the sentence pronounced on the prisoner, said, that if his own declaration, as it appeared in evidence, was to be believed, he was an habitual kidnapper—he was a dealer in human flesh; and such was the turpitude of his offence, that if the law would permit, he deserved to be executed. The court intended to inflict a punishment to the extent of their power; and, so far as depended on them, no expectation of mercy, no release from imprisonment, need be cherished by him.

The sentence and judgment of the court is, that you, Joseph Pulford, be confined in the state prison of the southern district of the state of New-York, at hard labour, for the term of fourteen years.

A dreadful scream in a female voice thereupon immediately resounded through the court-room. The prisoner's sister had attended and heard the sentence. She shrieked fearfully and fainted.

(COMMON SCOLD—BARRATRY.)

CHARLOTTE GREENWAULT and SARAH MOODY'S CASES.

VAN WYCK, *Counsel for the several prosecutions.*

E. MORRELL, PRICE and DAVID GRAHAM, *Counsel for the defendants.*

Previous to the trial of a woman as a common scold, the district attorney need not point out particular instances of scolding upon which he intends to rely.

A prosecution may be sustained against a common scold: but where there appeared to be an inveterate hostility in a particular neighbourhood against a woman, and violent recriminatory abuse appeared to have been exercised as well on behalf of the neighbouring women towards her as on her part towards them, however abusive, scandalous and clamorous may have been her language towards such women, a prosecution against her as a *common scold* cannot be maintained.

Violent women quarrels will not render them indictable as common scolds.

The defendants were severally indicted as common scolds, and their cases were brought to trial before the recorder and aldermen Kip and Anthony, on the 7th of December instant.

In the case of Charlotte Greenwault, after Van Wyck had opened the case, her counsel contended that it was incumbent on behalf of the prosecution, previous to the trial, to point out to the defendant the particular instances of scolding on which he intended to rely ; and as, in this case, the district attorney had not so furnished her with a bill of particulars, he should be precluded from proceeding further in the prosecution. The counsel, in support of this position, cited Burns' Justice, tit. Barratry. 2 Chitty's Crim. Law, p. 233. 1 Lord Raymond, p. 490. 12 Mod. 516. and 2 Term Rep. p. 586.

Van Wyck insisted, that although the practice of the courts in England, in the prosecution of a common barretor, required that the particular acts relied on should be furnished to the defendant previous to his trial, yet that practice was peculiar to that offence only, and never applied to the case of a common scold. In a trial for this offence it would be impossible to point out particular instances of scolding, nor do any of the authorities cited support the position assumed by the opposite counsel ; but, on the contrary, the authority last cited shows clearly that the practice never existed.

In reply, the counsel for the defendant insisted, that though no express authority authorized this practice in the case of common scolds, yet the offence of barratry, in all the books, was placed on the same footing, and was governed by the same principles.

Other counsel (we know not whether they were engaged in the case or not) *strongly asserted* that it had been decided in this court that an indictment could not be sustained in this country against a common scold ; and one of them said that such a decision had been pronounced by De Witt Clinton while sitting in this court as mayor ; but the counsel did not produce any such decision.*

The recorder delivered the opinion of the court, that it was not necessary for the district attorney, previous to the trial of a woman as a common scold, to furnish her with a specification of the particular instances of scolding upon which he intended to rely. In the case of barratry this practice had prevailed in the English courts ; but none of the authorities show that, in this respect, the offence under consideration is placed on the same footing. There is no reason why it ought ; and in the view of the court it would be impossible for the district attorney, in a case of this description, to furnish such specification.

It appeared in evidence, on the part of the prosecution, that the defendant resided at number 47 Gold-street, near the families of James Kelso and one Catharine Devoe. For several years the defendant had been in the habit of abusing the female members of those families by calling them the most indecent and opprobrious names, applicable to a woman, whenever she could see any of them either at their own door or in the street. She chased the children of Kelso in the street, abused the aged father of Mrs. Devoe on all occasions, and frequently spit in the face of her young daughter. Kelso stated in his testimony, that he was so much annoyed by the defendant that unless relieved he should be under the necessity of removing from her neighbourhood.

It further appeared, that the abuse of

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* If, in this country, such decision was ever pronounced, which we consider extremely doubtful, it was not warranted by the principles of criminal law. What! shall it be said that a common disturber of the public peace—a quarrelsome, turbulent and abusive woman, clamorous in and out of doors, at all times, is not to be restrained by the strong arm of public justice ? The only objection we have ever heard urged against a prosecution for this offence is, that by the common law, the punishment prescribed on a conviction is the *ducking stool;* and it is said, that according to our constitution, "no cruel or *unusual* punishments are to be inflicted" But have not our courts the power, on a conviction for a misdemeanor, to soften the punishment, or substitute one adapted to the nature of our government? The descendants of the peaceable William Penn have so thought and so decided : for we understand, from undoubted authority, that the records of criminal jurisprudence in Philadelphia show that a prosecution for this offence has been sustained ; and on conviction the defendant has been punished as for any other misdemeanor.

the defendant was not confined to the families of Kelso and Devoe, but that she was in the habit of abusing Mrs. Margaret Tierce, who never spoke to her. The defendant watched at her own door, and, whenever she saw Mrs. Tierce, abused her, by bestowing on her the vilest epithets, and said that she kept a —— house.

It appeared on the part of the defendant, principally by the testimony of Jameson Cox and Clarkson Crolius, that she is very deaf; and as is common with people in that situation, is very jealous, and supposes when people are discoursing that she is the subject of discourse. Both these gentlemen had known her a number of years, and she is an industrious, respectable woman, never, to their knowledge, in the habit of using obscene language.

It further appeared that she was the prosecutrix in two several prosecutions, now pending in this court, against the Devoes, for abusing her. And from the testimony of Hannah Brady, it appeared that she had heard Mrs. Devoe and her daughter use towards and concerning the defendant such language as a virtuous female would blush to repeat.

After the arguments of the respective counsel, the recorder charged the jury that to support a prosecution for this offence it must be established that the defendant was a *common scold*. The offence, in principle, was the same as for a common nuisance. It must appear to be to the common disturbance of the neighbourhood. In this case the witnesses who prosecute appear to have had violent quarrels with the defendant. Recriminatory language was used as well by the Devoes as the defendant. The testimony appears to the court rather slight to produce a conviction for the offence: it is a matter of fact solely for the determination of the jury.

The defendant was acquitted.

In the case of Sarah Moody, tried immediately after the one preceding, it appeared from the testimony of Margaret Kay, that the defendant was in the habit of bestowing the most scandalous epithets on the witness and her daughters; and scolded to others in their houses and in the streets.

Sophia M'Cready, on being sworn, with tears in her eyes, stated that the defendant, without provocation, came into the yard of the witness, and accused her, in plain terms, of infidelity to her deceased husband.

Van Wyck. I abandon this prosecution.

The defendant was acquitted.

(FALSE WEIGHTS AND MEASURES.)

WILLIAM W. WINANS' CASE.

VAN WYCK, *Counsel for the prosecution.*
BOGARDUS, *Counsel for the defendant.*

In a prosecution for selling by false weights and measures, it is incumbent on the prosecutor to show that the articles sold by the defendant, alleged to be short of weight or measure, were weighed or measured by the *standard weight or measure*.

The defendant, a grocer, in the Bowery in this city, was indicted for a misdemeanor at common law, in selling by false weights and measures.

It appeared from the testimony of Jonathan Ward, that he resides at Westchester, about twenty miles from this city. There had been running accounts between the defendant and the witness previous to the month of February last, when he spoke to him for half a hundred of sugar; a quantity was put up in a bag and carried by Ward in a wagon to Westchester, weighed by himself and his wife with a pair of steelyards and found deficient four pounds. The accounts still continuing open, and Ward not knowing but that the deficiency in the first parcel might be the result of accident, towards the latter part of March he purchased another half hundred of sugar, weighed it at home, and found the result the same as before. By the purchase of this parcel the accounts between the defendant and witness were nearly balanced. As yet he had imparted the circumstance to no person except his wife; but, in the month of August last, he was determined to ascertain to a certainty whether the defendant dealt dishonestly; and with that

view purchased of the defendant another half hundred of sugar, and procured one David Davis, to whom the witness confidentially communicated the facts in relation to the other parcels of sugar, to take this half hundred to another grocery, weigh it, and ascertain whether it was that quantity or not. Davis accordingly carried the sugar, which was in two separate parcels, to the grocery store of one Palmer, in the neighbourhood, and on weighing the parcels, bag and paper included, the weight was but about fifty three pounds. Ward then went to the defendant's store and charged him with selling by false weights, when Mrs. Winans attempted to account for the deficiency by saying, that she had weighed the sugar in three draughts, and that at each time, by mistake, a pound weight had been taken out of the scales to weigh lard or butter for a child. The sugar was then taken to a large pair of scales belonging to one Hunt, and weighed, and found more than three pounds deficient.

It appeared that afterwards a suit was commenced by the defendant, against Ward, in the eighth ward court, and he was taken on a warrant while on his way to Westchester.

John Repose, on being sworn as a witness on the part of the prosecution, testified, that he had dealt with the defendant three years, and during this time, until the transaction upon which this prosecution is founded, was propagated, had never heard a word to the prejudice of the defendant. After the propagation of this story, the witness, to satisfy himself, purchased seven pounds of sugar of the defendant, and, on weighing it, found it full weight.

Hereupon the counsel for the defendant was about calling a number of witnesses to establish his defence. The mayor said this would be but a waste of time, for this prosecution could not be sustained. In a case of this description it was incumbent on the prosecutor, and this was always in his power, to show that the article alleged to have fallen short in weight or measure had been weighed or measured according to the standard weight or measure. In this case the first parcels were carried to Westchester, and weighed by the prosecutor and his wife with a pair of steelyards. The other parcel was weighed in Palmer's store. Now, what evidence is before the court to show that either the steelyards or Palmer's weights were standard weight?

The jury, under the charge of the court, immediately acquitted the defendant, and his counsel moved for a copy of the record, for the purpose of commencing an action for a malicious prosecution against Ward.

(LARCENY—ASPORTATION OF GOODS.)

JAMES PHILIPS' CASE.

VAN WYCK, *Counsel for the prosecution.*
No Counsel appeared for the prisoner.

To constitute larceny there must be, technically, a carrying away, and the prisoner must have had entire possession of the property.

Where an article exposed for sale at a window was tied by a string, and the prisoner, intending to steal, took hold of such article, but neither cut nor broke the string, it was held that this was not a sufficient asportation, or carrying away, to constitute larceny.

The prisoner was indicted for petit larceny, in stealing one hat, of the value of three dollars, the property of John Bronson, on the 10th of December instant.

It appeared, that on the evening of the day preceding that laid in the indictment Bronson had several hats, which were exposed for sale at his window, stolen; and, for the purpose of detecting the thief, the next evening he tied a string to one of the hats, and exposed it at the window. The prisoner came and secretly took hold of the hat, but, finding it tied, relinquished his hold and ran. The string was neither cut nor broken.

The mayor intimated to the jury, and so charged them, that this prosecution could not be sustained; for, to constitute larceny, there must be a carrying away; and it must appear that the prisoner had complete possession of, and control over, the property.

The prisoner was immediately acquitted.

The doctrine on this subject may be

found in 1 Hale's P. C. p. 508. and 533. and 2 East's Crown Law, p. 555. and 556.

We deem it useful in this place to extract from the latter work a few leading cases: "The least removal of the thing taken from the place where it was before is a sufficient asportation, though it be not quite carried off.

"As where the prisoner took up a parcel in a wagon, and carried it from one end of the wagon to the other, with intent to steal it; although it was never taken out of the carriage, but he was seized in the fact; yet, by all the judges, this was a sufficient asportation to constitute felony.

"But where William Cherry was indicted for stealing a wrapper and some pieces of linen cloth; and it appeared that the linen was packed up in the wrapper in the common form of a long square, which was laid lengthwise in a wagon: That the prisoner set up the wrapper on one end in the wagon for the greater convenience of taking the linen out, and cut the wrapper all the way down for that purpose; but was apprehended before he had taken any thing: all the judges agreed that this was no larceny; although his intention to steal was manifest. For a carrying away, in order to constitute felony, must be a removal of the goods from the place where they were; and the felon must, for the instant at least, have the entire and absolute possession of them.

"One had his keys tied to the strings of his purse in his pocket, which Elizabeth Wilkinson attempted to take from him, and was detected with the purse in her hand; but the strings of the purse still hung to the owner's pocket by means of the keys. This was ruled to be no asportation: the purse could not be said to be carried away, for it still remained fastened to the place where it was before.

"So where A. had his purse tied to his girdle, and B. attempted to rob him, in the struggle the girdle broke, and the purse fell to the ground; B. not having previously taken hold of it, nor picking it up afterwards: it was ruled to be no taking.

"In the conference upon Cherry's case, above referred to, Eyre B. mentioned a case before him, where goods in a shop were tied to a string, which was fastened by one end to the bottom of the counter. A thief took up the goods and carried them towards the door as far as the string would permit, and was then stopped: this he held not to be a severance, and consequently no felony.

"James Lapier was convicted of robbing Mrs. Hobart on the highway, and taking from her person a diamond ear-ring. The fact was, that as Mrs. H. was coming out of the opera-house she felt the prisoner snatch at her ear-ring and tear it from her ear, which bled, and she was much hurt: but the ear-ring fell into her hair; where it was found after she returned home. Judgment being respited for the opinion of the judges, whether this were such a taking from the person as to constitute robbery; they were all of opinion that it was. It being in the possession of the prisoner for a moment, separate from the lady's person, was sufficient, although he could not retain it, but probably lost it again the same instant: and it was taken by violence.

"But in the case of Edward Farrel, who, upon an indictment for robbery, was found to have stopped the prosecutor as he was carrying a feather bed on his shoulders, and told him to lay it down or he would shoot him; on which the prosecutor laid the bed on the ground; but before the prisoner could take it up so as to remove it from the spot where it lay, he was apprehended: the judges were of opinion that the offence was not completed, and the prisoner was discharged."

(AIDING, ABETTING AND ASSISTING.)

ROBERT JOHNSON, WILLIAM CROSS and RICHARD RICHARDSON'S CASE.

VAN WYCK, *Counsel for the prosecution.*
PRICE, *Counsel for the prisoners.*

Where J., near a crowd in which were C. and R., picked a man's pocket of his pocket book and immediately made off and whistled, upon which C. and R. left the crowd and went with J. to a place remote from that where the pocket was picked, where the three were found dividing their supposed spoil, this was held by the jury sufficient evidence of a co-operation of the whole in the felony.

The prisoners were indicted for petit larceny, in stealing a pocket book of the value of twenty-five cents, the property

of John Coddington, on the 12th day of November last.

On the 10th of November the prosecutor, at an auction store at the corner of Wall and Pearl streets, had his pocket rifled, by some person unknown, of a pocket book containing 111 dollars, and a number of promissory notes. For the purpose of detecting the thief, the prosecutor stuffed another pocket book full of newspapers, tied it with a string within his pocket with one end exposed to view; and while in front of the auction store of Mills, Minton & Co. in Pearl-street, on the day laid in the indictment, Johnson, one of the prisoners, pulled out the pocket book, broke the string, and ran away with the pocket book; and as he ran whistled. Upon which the other two prisoners, who were in a crowd near, immediately went up Wall-street with Johnson, and they all went together into an alley in that street. The prosecutor, unobserved by the prisoners, followed them to a wharf near the Albany basin, where they were all seated, and were about dividing their supposed spoil. They were immediately apprehended.

Price: According to the evidence, Johnson only is guilty; the two others were but accessories after the fact, and were not engaged in the original taking.

Van Wyck, contra.

The recorder was inclined to think that there was not sufficient evidence to convict Cross and Richardson, and so charged the jury. The jury, however, rendered a verdict against the whole, and on the last day of the term they were each sentenced to the penitentiary two years.

Johnson, after receiving sentence, said to the court, in an audible voice, "These two men had nothing to do in this affair, and I did not take the pocket book. You take the law into your own hands; but give little chance to a poor person!"

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C. was indebted to R. in a large amount, who agreed that if C. would deliver him certain checks of D. to a specific amount, he, R., would simultaneously deliver to C. the check of R. to a specific amount. At the time appointed, the agent of C. presented to S., a clerk of R., the checks of D. agreed to be delivered, when S. held out the check he was to deliver, pursuant to agreement; whereupon the agent, believing that S. was about to deliver the check, delivered those of D. to S. who suddenly retreated and withheld the check of his principal, and retained those delivered to him by force. It was held, that should the jury believe from the facts and circumstances in the case, that R. and S. conspired to obtain those checks, contrary to such agreement, it was immaterial, for the pur-

poses of an indictment for a conspiracy, whether, at the time the checks were so obtained, they had been paid by D. to C. or not. Also, that it was immaterial whether, at that time, C. was indebted to R. to a greater or less amount than such checks; and it was also held, that if S., in such transaction, acted by the direction of R., as his clerk, he was not the less excusable by reason of standing in that relation, 1

Should the public prosecutor, for the purpose of supporting an indictment for a conspiracy, produce in evidence an injunction from Chancery, previously obtained in favour of either of the defendants on trial, and also a notice of a motion in the Supreme Court, and the rule obtained thereon in their behalf they are entitled to the benefit, as well of the allegations contained in the bill upon which the injunction was granted, as of those in the affidavits upon which the motion was founded, 12

It seems, that to sustain an indictment for a conspiracy, it is incumbent on the public prosecutor to show, that two or more persons confederated together to do an act known by them at the time to be unlawful and without colour of right; or to prove some facts from which such a confederacy can be reasonably inferred, *ib.*

It is unnecessary, in a prosecution for a conspiracy, to show that any step was taken by the conspirators, or either of them, towards the consummation of the act agreed to be done—it is sufficient, if an *agreement* to do some unlawful or immoral act existed, 121

Where D. was indicted for conspiring with G. and other persons, to the jurors unknown, and was tried separately, it was held, that it was not necessary for the jury to be satisfied that D. and G. conspired, nor that there should be sufficient testimony to convict any other person of that crime, if on trial; for should the jury believe that D. conspired with any person, whether named in the indictment or not, though there might not be sufficient evidence before them to convict such person, if on trial, they may, nevertheless, convict D. *ib.*

Constructive Felony.

Where a man by false representations, and with a felonious intent, obtained the delivery of goods, which the vendor sold to him for cash, this was held to be larceny; otherwise, had he delivered them on a credit, 33

Where the prisoner purchased a pair of shoes at a store for three dollars, and the vendor consented to repair a pair of boots, worth more than the shoes, and receive his pay for the shoes and repairing of the boots when the prisoner called for them, and without paying for such repairs he obtained their delivery by false representations, and with a felonious intent: it was held that an indictment for stealing the shoes could not be maintained, *ib.*

Where a man selected clothing at a store, and requested the store-keeper to send it to his lodgings, when he would pay cash on the delivery; instead of which he imposed on the carrier, by first getting possession of the goods, and delivering therefor a bank check of no value; and, when requested by the carrier to pay the money or redeliver the goods, laughed at him, and affected drunkenness—this was held a constructive felony, 46

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In a case of forgery, it is not necessary that the witness, who is produced to prove the handwriting of another, should have seen him write. It is sufficient if he swear he has corresponded, by writing, with the party, and believes it to be his handwriting—or, if the witness be an officer of a bank, and swear that he had often seen his bank book, and was in the habit of receiving his checks, and paying them in the ordinary course of business, this is equivalent to the evidence of handwriting by means of foreign correspondence, 52

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Where a man of genteel appearance, falsely represented himself as a wholesale dealer in Broadway, and that one of his country customers had sent to him an order for certain goods, which

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The false pretence must be predicated on some matter or thing pretended *then* to be in existence, but which, in truth, is not, *ib.*

An indictment for this offence should contain a full, explicit and categorical denial of the truth of the pretence or pretences charged, *ib.*

The false pretence, charged in the indictment, should be denominated as such, and not as a false *representation*, *ib.*

An indictment, which alleged that the defendant pretended that *he was a man of wealth and credit;* and, in a subsequent part, contained an explicit averment that he was not; is thus far sufficient; but where the indictment further alleged that the prosecutor, trusting to the *promises* and *assurances* of the defendant, and *being deceived by his false pretences*, delivered the goods, it was held insufficient, *ib.*

The indictment should allege, that the false pretence or pretences charged, was or were the inducement to the delivery of the goods. (See 1 vol. City-Hall Recorder, p. 140, and ante, p. 61.) *ib.*

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The false pretence or pretences charged, must be the inducement to the parting with the property, *ib.*

Though a civil suit might not lie against a man, who had represented an article in his possession, and sold or exchanged by him, to be of a quality different from what it was, either for a fraud or on the warranty, still, a prosecution for obtaining goods by false pretences may be sustained, in a case where a false representation is made, *relative to the quality*, in conjunction with other false representations, not predicated on the article, should the jury believe that such false pretences induced the delivery of the prosecutor's goods, *ib.*

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A *bona fide* discharge, either under the former three fourth act, or the present two third act, in the state of New-York, is valid and effectual in securing the property of the debtor, subsequently acquired, from any judgment obtained, or any contract made, in this state, prior to such discharge, *ib.*

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J.

Jurisdiction.

By an act of the legislature of the state of New-York, passed Feb. 15th, 1800, (1 vol. R. L. 139,) it is enacted, that "all that island called Governor's Island, on which Fort Jay is situated, bounded on all sides by the waters of the East River and Hudson River, shall hereafter be subject to the jurisdiction of the United States." By the constitution of the United States, (1st Art. 8th sect.) it is declared, that congress shall *have power to exercise exclusive legislation*, in all cases whatsoever, over such district as might become the seat of government of the United States, "and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; and to make all laws which shall be needful and necessary for carrying into execution the foregoing powers." It was held, that notwithstanding the above grant in our statute, and the clause in the constitution, the Court of Sessions, in and for the city and county of New-York, had jurisdiction over offences committed on Governor's Island, 27

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Where a challenge to the favour is taken, the specific cause need not be assigned previous to the trial of such challenge, *ib.*

A juror in a criminal case should stand wholly indifferent between the prosecution and the accused, and *free from all exception*; and if, on the trial of a challenge, circumstances appear sufficient to produce a doubt in the minds

of the triors, whether such juror stands indifferent or not, it is their duty to reject him, *ib.*

K.

Kidnapping.

An act of New-Jersey, of 1812, provided, that before any negro should be removed into any other state, a judge should, after examining him or her, give a certificate that such removal was with the free will and consent of such negro. On the 7th day of November, 1818, R. having purchased a black woman in the state of New-Jersey, and having duly obtained such certificate, removed her out of that state. But on the 5th of November, 1818, the legislature of New-Jersey passed an act, providing that no negro should be removed out of the state, except under certain circumstances, which did not apply to the removal by R.; and that if such negro should be removed, contrary to the act, he or she should be free. It was held, that by such removal such woman became free, 47

On the traverse of an indictment under the act, for kidnapping or inveigling a negro, with intent to send him out of the state, it is not necessary to show, either that force was employed by the defendant, or that it was against the will of such negro, 172

Reference to cases on this subject in former parts of this work, *ib.* n.

See Habeas Corpus.

L.

Landlord's Rights.

When a tenant wrongfully holds over after the expiration of his term, the landlord may enter peaceably and disposses him; but he has no right, if resisted, to enter forcibly, 158

Larceny.

Where stolen property is returned to the owner, by a person who, at the time, gives an account of his possession, it was held, that such account might be received in evidence as part of the *res gestæ*, 91

The possession of stolen property, where the prisoner can show that he was but an accessary after the fact, shall not be sufficient to convict him of the principal offence; but if, in accounting for such possession, he gives false and inconsistent statements, these will operate to destroy the presumption which, otherwise, would be in his favour, as much as they would in the attempt to show that the property came into his possession honestly, 157

To constitute larceny there must be, technically, a carrying away, and the prisoner must have had entire possession of the property, 177

Where an article exposed for sale at a window was tied by a string, and the prisoner, intending to steal, took hold of such article, but neither cut nor broke the string, it was held, that this was not a sufficient asportation, or carrying away, to constitute Larceny, *ib.*

Statute relative to stealing promissory notes extracted, 36, n.

Authorities on this subject collected, 178

See Aiding, Abetting and Assisting—Confession—Grand Larceny—Indictment—Lottery Ticket—Constructive Felony—Pardon—Restitution of Stolen Goods.

Lottery Ticket.

A lottery ticket, before the drawing of the lottery, is neither an order for the payment of money, nor a certificate for the payment of money, nor a public security; and is not the subject of larceny under the statute, 36

M.

Malicious Prosecution.

To sustain an action for a malicious prosecution, it is unnecessary for the plaintiff to show *actual malice;* but should the jury, from all the facts and circumstances in the case, believe that the prosecution complained of could have resulted only from an intention to harass and oppress the plaintiff, by colour of law, and that the defendant had neither reasonable nor probable cause for such prosecution, *the law supplies malice,* in consequence of his act; and it will be their duty to find him guilty, 92

Manslaughter.

Though the declaration of a party, (that *he or she was murdered by a particular person*,) made immediately after a mortal blow is inflicted, and when the party considered himself, or herself, in immediate danger of death, may be received in evidence, as having been made *in extremis*, yet, where the wounded party languished for several days afterwards, and then died, it was held, that such declaration might also be given in evidence as part of the *res gestæ*; and that it was unnecessary for the jury to determine whether the declaration was made *in extremis*, or not, 109

Where the prisoner, either in a fit of anger or intoxication, or both, threw a teapot at his wife, or struck her with it, by reason of which she died, this was held to be a felonious homicide, *ib.*

N.

New trial.

A new trial cannot be granted on the merits, in a case of felony, 39

Nuisance.

To constitute a public nuisance by conducting, in a populous city, a lawful business, it is not sufficient that its exercise be merely *disagreeable*; but it must be an annoyance, calculated to interrupt the public in the *reasonable* enjoyment of life or property, 87

See Hogs.

O.

Ownership.

See Femme Covert.

P.

Pardon.

After conviction and before sentence, the keeper of a prison has no right to discharge a criminal convict upon the production of a pardon; the court only is to judge of its validity, 58

During the month of June, 1806, at the Orange oyer and terminer, N. was convicted of three distinct grand larcenies, on the first of which he was sentenced to the state prison two years, on the second, one year, and on the third, two years. On the 3d of September, 1808, he received a pardon, which recited, a conviction for grand larceny at the same court, in the month of June, 1806, and a sentence *for five years*; and the pardon thereupon released and acquitted him from further imprisonment. It was held that those convictions rendered him incompetent as a witness, notwithstanding such pardon, 119

Pauper.

See Appeal.

Perjury.

The falsity of the oath assigned as perjury must be verified by more than the oath of *a single witness*; but it is not necessary that *two witnesses* should be produced, on the part of the prosecution, to prove the falsity of such oath. All that is necessary on this point is, that where the *oath* of the party accused is balanced by the *oath* on the part of the prosecution, the public prosecutor should throw sufficient in the scale of testimony, on his side, to cause a preponderance, 58

Where a complaint for a misdemeanor was entered in the police office on the 4th of October, on which day the court of sessions, in and for the city and county of New-York, commenced its term, and on the 5th of October, the prisoner offered to justify as bail in the same case, and did so; it was held, that the police magistrate had competent authority at common law, to administer an oath, touching the sufficiency of such bail, on his justifying; and that if such oath, in a material matter, be false, a prosecution for perjury might be sustained against him, 125

Though in such case it must appear from the matter spread on the face of the indictment, that the oath was material in the subject of inquiry, yet it is not necessary, that it should be expressly averred in the indictment that such oath was material, *ib.*

Where an indictment alleged, that the

prisoner swore "that he was then the owner of the house number 106 Mulberry-street," and proceeded, by way of innuendo, thus, (meaning a certain house of that number in Mulberry-street, *in the city of New-York aforesaid;*) it was held, that those words in the innuendo, designating the city, were but explanatory, and did not extend or enlarge the meaning of the matter preceding. And it was further held, that the averment of the falsity of that oath, in the indictment, "*that he was not the owner of the house* 106 *Mulberry-street*," without the words, "*in the city of New-York*," was sufficient, *ib.*

Though the averments of the falsity of the oath, in an indictment for perjury, negative each allegation in the oath, yet it is not necessary, on the trial, that every part of the oath averred to be false, should be so proved, *ib.*

In a proceeding for bastardy, after the woman has sworn who is the putative father, and he has entered into the usual recognisance before the magistrate to appear in the sessions, an affidavit taken by the mother before him, stating that the child was dead, though false, is a proceeding *coram non judice*, upon which a prosecution for perjury cannot be predicated, 130

To constitute perjury the oath must be taken before some magistrate competent to administer it, *ib.*

Piracy.

On the traverse of an indictment against an American citizen, for piratically seizing and capturing a vessel belonging to a power at peace with the United States, evidence was introduced on behalf of the prosecution, showing that previous to the capture he sailed under a commission, forged on the government of Artegas, and no other evidence as to the capture of the vessel was produced, except that derived from his declaration, that he captured the vessel under a good commission; it was held, that it was incumbent on him to show under what commission he captured such vessel, 161

To prove a foreign commission, under which one sailed charged with piracy, it is not necessary that the witness should have seen him write, under whose signature and seal the commission purports to have been issued. It is sufficient if the witness saw the commission passing at the office, from whence it issued, as a genuine commission, *ib.*

A commission, purporting to be that of Artegas, under his seal, issuing from the office of the American consul at Buenos Ayres, as the agent of Artegas, with the name of the vessel, but without either the name of the captain, or the number of guns, being inserted, at the time it was issued, may be afterwards filled up by the person intrusted with such commission: and it will be sufficient to exculpate an American citizen, charged with piracy in capturing a Portuguese vessel, *ib.*

Professional Confidence.

Where a note which had been protested at the bank, originally came into the hands of M., an attorney, from his client D., one of the endorsers, and N., another of the endorsers, against whom a suit is commenced and a judgment by confession entered, satisfies the judgment, and then requests M. to collect the money due on the note of the maker, and is afterwards indicted for perjury, on the trial of which it is necessary to produce the note; it was held that M. could not withhold it on the ground of professional confidence, 168

R.

Restitution of Stolen Goods.

B. was convicted on an indictment for grand larceny, in stealing one guinea of the value of $4 75, thirty doubloons of the value of $15 each, and four hundred and forty-four Spanish dollars. On the trial it appeared, that there were found in possession of the prisoner one hundred and thirty-six Spanish dollars, among which was one identified to be the money of the prosecutor, and a greater number of doubloons than laid in the indictment: it was held that the prosecutor, on application, was entitled to an order for the restitution of the money laid in the indictment, 113

S.

Scold.

Previous to the trial of a woman as a common scold, the district attorney need not point out particular instances of scolding upon which he intends to rely, 174

A prosecution may be sustained against a common scold; but where there appeared to be an inveterate hostility in a particular neighbourhood against a woman, and violent recriminatory abuse appeared to have been exercised as well on behalf of the neighbouring women towards her as on her part towards them, however abusive, scandalous and clamorous may have been her language towards such women, a prosecution against her as a *common scold* cannot be maintained, *ib.*

Violent women quarrels will not render them indictable as common scolds, *ib.*

Objections to sustaining a prosecution for this offence considered, 175 n.

Scienter.

On the traverse of an indictment for uttering a forged check, *knowing it to be forged*, the public prosecutor, for the purpose of showing the *scienter*, will be allowed to prove that the prisoner had passed a check, not laid in the indictment, purporting to be drawn by a person who had no account at the bank on which such check was drawn, 52

In a prosecution for obtaining goods by false pretences, the public prosecutor cannot, for the purpose of establishing the *scienter*, show that the defendant, for the purpose of obtaining goods, made the same pretences set forth in the indictment to a person not named therein, 143

Evidence that the prisoner passed other counterfeit bills, not laid in the indictment, for the purpose of establishing the *scienter*, is inadmissible, unless such bills are produced, 166

D. in the month of July, 1818, was tried on an indictment for passing two counterfeit bills on the Mechanics' Bank, and on the trial, for the purpose of establishing the *scienter*, the district attorney introduced testimony, that a year previous to that trial, he passed other counterfeit bills, and strong circumstances were adduced to show that the prisoner knew the last-mentioned bills were counterfeit. He was, however, acquitted. On the traverse of an indictment against him, in the month of December, 1819, for passing other counterfeit bills, it was held, that the district attorney might introduce testimony that the prisoner passed not only the bills for the passing of which he had formerly been tried and acquitted, but also those passed previously, *ib.*

V.

Verdict.

A prisoner tried with another is not entitled to call for a verdict of acquittal, that he may be sworn as a witness, unless where no evidence whatsoever against him has been produced, 136

W.

Warrant.

—— from an Assistant Justice's court cannot be executed by the plaintiff, 46 n.

G. gave S. a promissory negotiable note, who, without consideration, endorsed it to W. and commenced a suit in his name, by warrant, before an assistant justice in New-York, and procuring a deputation on the warrant, attempted to take G., who assaulted him—it was held, that this deputation, being an evasion of the statute, was illegal, *ib.*